Office-Supreme Court, U. S.
FILED
JUN 22 1974
, CLERK

No. S. 73-1766 and 73-1834

IN THE

# Supreme Court of the United States of America

OCTOBER TERM, 1973

---

UNITED STATES OF AMERICA, *Petitioner*,

v.

RICHARD M. NIXON,
*President of the United States of America, et. al,*
*Respondents*

---

## BRIEF OF RESPONDENT JOHN D. EHRLICHMAN

---

WILLIAM SNOW FRATES
ANDREW C. HALL
SPENCER H. BOYER
HENRY H. JONES
GERALD ISRAEL

*Counsel for Respondent*
JOHN D. EHRLICHMAN

## INDEX


Opinions Below ..... 1

Jurisdiction ..... 1

Questions Presented ..... 1

Statement of Facts and of the Case ..... 1

Summary of Argument ..... 4

Argument ..... 5

I. The Subpoena Authority under Rule 17 may be used to implement the Prosecutor's duty to disclose ..... 5

II. The materials subpoenaed are subject to disclosure under Federal Rule 16(a), 16(b), The Jencks Act and *Brady v. Maryland* ..... 6

A. Basic Approach to Discovery ..... 6

B. Leaving aside the question as to whether the Government's duty to disclose extends to material in the possession of the President, the materials subpoenaed are all subject to discovery under the Federal Rules and the Jencks Act ..... 8

C. The Significance of the President's Possession ..... 11

III. The Exercise of Executive Privilege cannot prevail over the Defendant's Right to Discovery

Conclusion ..... 16

Certificate of Service ..... 17

## TABLE OF CASES AND AUTHORITIES


Alderman v. U.S., 394 U.S. 165 (1968) ..... 14

Bowman Dairy Co. v. U.S. 341 U.S. 214 (1959) ..... 5

Brady v. Maryland, 373 U.S. 83 (1963) ..... 1, 2, 3, 4, 5, 6, 10, 17

Dennis v. U.S. 384 U.S. 855 ..... 8

Giles v. Maryland 386 U.S. 66 (1965) ..... 6, 7, 13

Nixon v. Sirica, 487 U.S. 700 (D.C. Cir. 1973) ..... 3

Roviero v. U.S. 353 U.S. 53 (1956) ..... 15

Ross v. Texas 474 F 2d 1150 (5th Cir. 1973) ..... 12

U.S. v. Abrams, 29 F.R.D. 178 (1960) ..... 11

U.S. v. Andolschek, 142 F 2d 503 (2d Cir. 1948) ..... 15

U.S. v. Bryant, 431 F 2d 624 (D.C. Cir. 1974) ..... 6, 11

U.S. v. Crisona, 416 F 2d 107 (2d Cir. 1969) ..... 8, 9

U.S. v. Deutsch, 475 F 2d 55 (5th Cir. 1973) ..... 12

U.S. v. Krogh, 391 F 2d 138 (2d Cir. 1968) ..... 11

U.S. v. Leightfuss, 331 F. Supp 723 (N.D. Ill. 1971) ..... 5, 13

U.S. v. Lumbomski, 277 F Supp. 713 (N.D. Ill. 1967) ..... 8

U.S. v. Percevault, 61 F R.D. 338 (E.D.N.Y. 1973) Rv'd .... F 2d .... (2d Cir. 1974) ..... 9

U.S. v. Reid, 43 F.R.D. 820 (N.D. Ill. 1967) ..... 14

U.S. v. Reynolds, 345 U.S. 1 (1953) ..... 15

U.S. v. Rosenberg, 299 F. Supp. 1241 (E.D.N.Y. 1969) ..... 9

U.S. v. Rosenberg, 10 F.R.D. 521 (S.D.N.Y. 1950) ..... 14

U.S. v. Taylor, 25 F.R.D. 225 (E.D.N.Y. 1960) ..... 6


## STATUTES


18 USC Sec. 1623 ..... 1

18 USC Sec. 3500 ..... 1, 3, 10


## RULES OF PROCEDURE


Rule 16, Federal Rules of Criminal Procedure ..... 4, 5, 6, 8, 9, 10, 11, 14

Rule 17(c), Federal Rules of Criminal Procedure ..... 3, 4, 5, 6, 9

Rule 54(c) Federal Rules of Criminal Procedure ..... 11

Rule 57(b), Federal Rules of Criminal Procedure ..... 6

Idaho R. Crim. Proc. 16(a)(1)(iv) ..... 11

N.J. Rules of Ct. 3:13-3(c) ..... 11

Texas Code Crim. Proc. Art. 39.14 ..... 11


## OTHER AUTHORITIES


ABA, Standards, Discovery and Procedure Before Trial, Approved Draft 1970, Sec. 24 ..... 6

Williams, One Man's Freedom ..... 7

## OPINIONS BELOW

The opinion of the District Court is unreported, and is included in the brief of the petitioner.

## JURISDICTION

Respondent John D. Ehrlichman adopts by reference the statement in support of jurisdiction filed by the Special Prosecutor in his brief filed with this Court on June 21, 1974.

## QUESTIONS PRESENTED

1. Whether the subpoena *duces tecum* in question was properly issued under the Federal Rules of Criminal Procedure.

2. Whether Executive Privilege, (if applicable) or the President's authority as Chief Executive Officer to determine what evidence will be furnished to a subordinate prosecuting official (if such authority is applicable) may prevail over the rights of defendant in a criminal case to discovery under Rule 16, Federal Rules of Criminal Procedure, the Jencks Act (18 U.S.C. 3500), and the government's duty to produce exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963)*

## STATEMENT OF FACTS AND THE CASE

The Grand Jury indicted Defendant Ehrlichman and six others for conspiring to obstruct justice, obstructing justice, making false statements to agents of the Federal Bureau of Investigation, and giving false testimony in violation of 18 U.S.C. Sec. 1623. In the course of pretrial discovery, prior to argument on motions to produce filed by the defendants below, the Special Prosecutor filed a motion for an order

* This case presents various issues relating to the applicability of executive privilege, and the relationship of the President and the Special Prosecutor. See, e.g., the Petition for Writ of Certiorari of the Special Prosecutor. Respondent Ehrlichman is not directly concerned with the determination of these issues, except insofar as that determination bears upon his rights of discovery.

directing the issuance of a subpoena *duces tecum* to Richard M. Nixon for the production of a number of tapes and documents relating to a wide variety of Presidential conversations which constitute the *res gestae* of the charges of conspiring to obstruct and obstructing justice. In supporting his request for the subpoena the prosecutor properly asserted that to some measure these conversations and tapes thereof were required to be produced under the government's duty to produce exculpatory evidence as required by *Brady v. Maryland*, 373 U.S. 83 (1963). The Court correctly found that the conversations which were the subject of the subpoena were relevant, material and based thereon entered its order directing the issuance of the subpoena.

The President, through his special counsel, filed a motion to quash the subpoena pursuant to Rule 17(c), Federal Rules of Criminal Procedure. The President asserted that the Court lacked jurisdiction to resolve an inter-executive branch dispute in that the President was the final arbiter as to what evidence would be used in the criminal prosecution; that the doctrine of executive privilege applied to conversations between the President and his senior advisors as a part of the executive decision-making process, and as a result, the documents were not subject to production; and the Special Prosecutor had failed to satisfy the relevancy and materiality requirements of Rule 17(c) Federal Rules of Criminal Procedure; and that *Brady v. Maryland, supra,* did not include documents or records which were within the possession, custody and control of the Office of the President. The President further asserted that notwithstanding the broad application of *Brady v. Maryland, supra,* that rule does not include privileged documents and that the defendant's right to due process of law was inferior and subject to the concept of executive privilege.

Respondent Ehrlichman filed a memorandum in opposition to the President's motion to quash asserting that the government had a duty to produce transcripts and records relating to the subpoenaed conversations under Rule 16(a),



Rule 16(b), *Brady v. Maryland, supra,* and by inference the Jencks Act. Respondent Ehrlichman further asserted that the Special Prosecutor's subpoena was an appropriate mechanism for obtaining material so as to fufill the duty owed to the defendants under *Brady v. Maryland,* Rule 16, and the Jencks Act. Respondent Ehrlichman further asserted that the duty to produce documents was absolute and that in the absence of production, the prosecution could not go forward.

In its opinion of May 20, 1974, the District Court rejected the contention that the proceeding involved solely an intra-executive dispute thereby depriving the Court of jurisdiction; rejected the claim of executive privilege on the authority of *Nixon v. Sirica,* 487 F 2d 700 (D.C. Cir. 1973); held that the Special Prosecutor had satisfied the requirements of Rule 17(c) because the subpoena was based upon the Special Prosecutor's need for these materials for his own use at trial. The Court found it unnecessary, therefore, to rule upon the "defendant's contention that the subpoenaed materials are necessarily producible to them under the principles enunciated in *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, the Jencks Act, 18 U.S.C. Sec. 3500, and Rules of Discovery for Criminal Proceedings." The opinion did note, however:

> It is, of course, the Special Prosecutor's continuing obligation to furnish defendants with *Brady* material that comes into his possession. Defendants' requests for access to the whole of materials produced will be more appropriately considered in conjunction with their pretrial discovery motions.

The substance of the subpoenaed conversations are carefully discussed in the Appendix to the Special Prosecutor's Memorandum filed in Opposition to the Motion to Quash in the Trial Court. Since Defendant Ehrlichman does not have the benefit of the Grand Jury transcripts and other evidence in the possession of the Government, the assertions of the Prosecutor must, for the time being, be accepted as accurate. The substance of the subpoenaed con-

versations are fully discussed in that appendix and no further amplification can be provided until after discovery is had.

## SUMMARY OF ARGUMENT

The Respondent agrees that the Special Prosecutor met the standards for issuance of the subpoena under Rule 17(c), even if the Court considers only the Special Prosecutor's own use of the materials subpoenaed. However, the subpoena also can be supported by the Special Prosecutor's duty to disclose the material subpoenaed, *i.e.*, that Rule 17(c) has been employed by the Special Prosecutor to obtain materials that will eventually be required to submit to the inspection of the defendants pursuant to the Federal Rules, the Jencks Act, and *Brady v. Maryland*. The materials covered by the subpoena all fall within one or more of the categories of materials subject to discovery under the Federal Rules or the Jencks Act. Some are recorded statements of the defendant, which are discoverable under Rule 16(a). Others are recorded statements of co-defendants, discoverable under 16(b). Still others are recorded statements of prospective prosecution witnesses and therefore must eventually be made available under the Jencks Act. Finally, much of the material may be exculpatory, and therefore subject to disclosure under *Brady*. The fact that the materials are in the possession of the President does not relieve the Prosecutor of his duty to disclose the same. Rule 16 and the Jencks Act apply to statements possessed by any agent of the Executive Branch and *Brady* has the same scope, at least where a specific claim for particular material has been made.

The Respondent is not directly involved in the dispute as to the claim of executive privilege or executive authority to control the evidence submitted in a Federal prosecution. Accordingly, this brief does not consider these issues except with respect to one point—such privilege or special authority, if applicable, cannot override the defendant's



right to discovery. If discovery is not granted as required under the Federal Rules, *Brady*, and the Jencks Act, the prosecution must be dismissed.

## ARGUMENT

### I. *The Subpoena Authority under Rule 17 may be used to implement the prosecution's duty to disclose.*

The court below found that requirements of Rule 17(c), Federal Rules of Criminal Procedure, had been met by the prosecutor with respect to the prosecutor's own potential use of the subpoenaed material at trial. Respondent agrees with this conclusion, which, as the court below noted, is fully supported by an analysis of the conversations in question. Respondent also contends, however, that the material subpoenaed must be disclosed to the defendant under Rule 16, Federal Rules of Criminal Procedure, *Brady v. Maryland*, and the Jencks Act, and the Special Prosecutor can properly utilize Rule 17 as a vehicle to obtain that material so as to comply with his duty to disclose.

Admittedly, such use of Rule 17 is unusual. Ordinarily, if the U.S. Attorney does not have material subject to his duty to disclose in his immediate possession, that material may be obtained promptly by informal communication. See *e.g., United States v. Leichtfuss*, 331 F. Supp. 723 (N.D. Ill. 1971) (involving disclosure of various records of Selective Service Boards). Here, however, where customary informal requests within the government have been to no avail, Rule 17(c) must be available. The use of the subpoena *duces tecum* is entirely consistent with the wording of Rule 17(c) and Supreme Court's interpretation of 17(c) in *Bowman Dairy Co. v. United States*, 341 U.S. 214 (1951). *Bowman Dairy, supra*, arose in the context of an attempt by a defendant to obtain from the Government, before trial, material to which it was not entitled under the discovery provisions of Rule 16. The same would be true in a case where, for example, the government loaned evidence in its possession to a third party (*e.g.*, an agency of another jurisdic-

tion). Since the government, having had the material, would still be responsible for its production, see *United States v. Bryant*, 431 F 624, 642 (D.C. Cir. 1971), Rule 17(c) would be the appropriate means of obtaining that evidence. The Special Prosecutor clearly established in the District Court the evidentiary value of the materials in question here.

The Court, in *Bowman* emphasized that "Rule 17(c) was not intended to provide an additional means of discovery." 341 U.S. at 220. However, the Court also noted:

> It would be strange indeed if the defendant discovered some evidence by the use of Rule 16 . . . and yet could not require its production by Rule 17(c).

Although this case is obviously quite different, the Court's recognition in *Bowman* that Rule 17(c) must be available to implement Rule 16 is equally applicable here. Indeed, if Rule 17(c) were not available, the court could certainly issue a subpoena *duces tecum* under Rule 57(b) to implement Rule 16. *cf., United States v. Taylor*, 25 F.R.D. 225, 228 (E.D.N.Y. 1960). The *ABA Standards, Discovery and Procedure Before Trial, Approved Draft* 1970 Sec. 24 (material held by other governmental personnel) report that such an approach is proper. These standards provide:

> . . . and if the prosecuting attorney's efforts are unsuccessful and such material . . . are subject to the jurisdiction of the Court, the Court shall issue suitable subpoenas . . . to cover such material to be made available to defense counsel.

II. *The materials subpoenaed are subject to disclosure under Federal Rule 16(a), 16(b), the Jencks Act, and Brady v. Maryland.*

### A. BASIC APPROACH TO DISCOVERY

In *Giles v. Maryland*, 386 U.S. 66 (1965), Justice White, in a concurring opinion, said that Courts in enforcing the mandate of *Brady v. Maryland*, 373 U.S. 83 (1963) requiring production by the Government of material in its possession that is exculpatory should compare "what the state knows at trial in comparison to knowledge held by the defense." *Giles v. Maryland*, 386 U.S. 66 at 96 (concurring opinion). The case at bar is an extreme instance of a striking disparity between the resources at the disposal of the Government. The Government has been able to generate long and detailed testimony to invoke unprecedented court remedies and procedures to obtain tapes and documents, to launch an investigation of that testimony and to prosecute using a sizeable staff and budget.



> The Government, it has been said, also has the most superb engine for discovery ever invented by the legal mind—namely, the grand jury. Before trial the prosecutor could call every witness with any knowledge of the facts in front of a grand jury and interrogate him with virtually no holds barred. Neither the accused nor his lawyer had any right to be present, to propose questions to object to procedure. The defendant could not even find out the names of the witnesses who testified against him, much less the substance of their testimony.
>
> *Williams, One Man's Freedom*, p. 168.

In the instant case the grand jury has been engaged in fact gathering and the taking of testimony for an unusually extended period of time. It was empanelled prior to the Watergate break-in on June 5, 1972, over two years ago. So long have its deliberations continued that, for hardship reasons, some grand jurors have had to be excused from further service. Additional grand juries have been empanelled creating collectively one of the major grand jury investigations in history.

In addition, the F.B.I. investigation, the Senate executive session hearings, Senate staff interviews, and investigative interviews conducted by the Senate Select Committee on Presidential Campaign Activities during the last year together with the computerization of cross-references to every witness and every document, have placed in the hands of the Government such a massive amount of detail and investigative material that the comparison suggested by Jus-

tice White in *Giles* between the prosecution's knowledge *vis a vis* that of the defense reveals a dramatic, if not inequitable, disproportion. This lack of equality makes it especially important that issues relating to the scope and importance of the defendant's discovery be viewed in light of the policy, noted in *Dennis v. United States,* 384 U.S. 855, 868, that "disclosure rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice."

While the subpoenaed materials in this case are obviously important to the Special Prosecutor, they are even more important to the defendant. The significance of these materials is indicated by the very fact that, without relying upon the possible exculpatory quality under *Brady,* substantial portions fall within the category of materials that, because of their essential nature, are made discoverable as a matter of right under the Federal Rules and the Jencks Act.

B. *Leaving aside the question as to whether the government's duty to disclose extends to material in the possession of the President, the materials subpoenaed are all subject to discovery under the Federal Rules and the Jencks Act.*

A substantial portion of the taped conversations involve Respondent Ehrlichman. Rule 16 requires the Court to "permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government." Although 16(a) states that the court "may" permit such inspection, lower courts generally have read "may" to mean "shall," in accord with the history of the adoption of the Rule. See Advisory Committee Notes to the Amendment of Rule 16(a), recently approved by the Supreme Court. A tape recording of a conversation clearly constitutes a recorded statement. See, *e.g., United States v. Crisona,* 416 F. 2d 107 (2d Cir. 1969); *United States v. Lubomski,* 277 F.



Supp. 713, 719-722 (N.D. Ill. 1967). Moreover, Rule 16 has regularly been held to apply to recordings of conversations between defendants and third persons who are not investigative agents of the government. See, *e.g., United States v. Crisona, supra; United States v. Rosenberg,* 299 F. Supp. 1241 (S.D.N.Y. 1969).

As noted in *Crisona, supra,* there is "nothing in the plain language of Rule 16(a) or the Notes of the Advisory Committee accompanying it "which would suggest limiting Rule 16 to statements made to investigative agents or to statements made prior to arrest. 416 F 2d at 115. Finally, as shown by the Special Prosecutor in his memorandum supporting the subpoena, the recorded statements are all clearly "relevant" both for the purposes of Rule 17(c) and 16(a).

Some of the recorded conversations covered in the Special Prosecutor's subpoena did not involve the Respondent. However, these conversations all involved conversations of the President with co-defendants or prospective government witnesses. Since indicted co-defendants are not prospective witnesses, the statements do not fall within the Jencks Act limitation upon pretrial discovery. Rather, they are discoverable under the first sentence of Rule 16(b), which permits discovery of "document,s tangible objects . . . or copies or portions thereof, which are within the possession, custody, or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable."

Statements of co-defendants in conspiracy cases arguably should be discoverable automatically under Rule 16(a). In *United States v. Percevault,* 61 F.R.D. 338 (E.D.N.Y. 1973) the Court concluded that, under Rule 16, a defendant can compel production of co-conspirators' statements. The court reasoned that under Rule 16(a) the defendant had an absolute right to all written or recorded statements or confessions made by him. The court further reasoned that

under the rules of evidence, a statement by a co-conspirator is admissible against the defendant. Consequently, the court concluded that if a co-conspirator's statement is to be introduced into evidence against the defendant on the theory that it is the defendant's own statement, fairness dictates that under Rule 16(a) the defendant be allowed to discover this pre-arrest statement along with statements the defendant uttered. Thus, the court held that under Rule 16(a) the government must furnish the defendant with statements of co-conspirators—whether or not named in the indictment—which the government intends to offer into evidence against the defendant. The court further concluded that since sub-division (a), unlike sub-division (b) of Rule 16, is not subject to a Jencks Act exception, this result applies whether or not the co-conspirator will testify as a government witness. Judge Weinstein's opinion in *Percevault* was later reversed by the United States Court of Appeals, .... F 2d .... (2d Cir. 1974). Nevertheless, his reasoning remains persuasive—although not crucial in terms of supporting the prosecutor's case of Rule 17(b) to implement his duty to disclose under Rules 16(a) and (b).

The statement of non-defendants who are prospective government witnesses must be made available to the defendant under the Jencks Act. That Act as amended in 1970, now extends to all statements within the possession of the United States, whether or not made to a government agent. See, 18 U.S.C. Sec. 3500.

Finally, aside from his duty to obtain materials which would be a duty to produce under Rule 16 and the Jencks Act, the prosecutor could also justify his subpoena request (as he did) upon his duty to disclose exculpatory material under *Brady v. Maryland*. While the precise contents of the subpoenaed material are unknown, there is reason to believe that it may contain exculpatory material. It should be noted in this regard that the standard for determination, what might constitute exculpatory material is traditionally



applied more liberally where, as here, a specific request for the material has been made. See *United States v. Krogh*, 391 F. 2d 138 (2d Cir. 1968)

## C. THE SIGNIFICANCE OF THE PRESIDENT'S POSSESSION

The President's counsel suggested in the court below that prosecution's duty to make disclosure to the defendant extends only to materials "in the hands of the prosecutor or the investigative agency involved in the case." This position is contrary to both the language and thrust of the Rules, statutes and decisions upon which defendant's right to discovery is based. Rule 16 refers to materials "within the possession, custody or control of the *government*". It is not limited to materials within the possession of the "attorney for the government." See Rule 54(c). Compare the language of various State discovery rules, *e.g.*, Idaho R. Crim. P. 16(a)(1)(iv) (prosecuting attorney); N.J. Rules of Court 3:13-3(c) (prosecuting attorney); Tex. Code Crim. P. Art. 39-14 ("of the State or any of its agencies"). Decisions relying upon that Rule have required production of materials within the possession of agencies that are not part of the Department of Justice. See, *United States v. Abrams*, 29 F.R.D. 178 (1960) (Statements given to Securities & Exchange Commission). The language of the Jencks Act is equally broad. It refers to statements "in the possession of the United States." Indeed, *United States v. Bryant*, 439 F. 2d 642 (D.C. Cir. 1972), cited by the President's counsel in connection with the alleged limited scope of Brady, clearly recognizes scope of Federal Rule 16 and the Jencks Act.

> The fact that it was the Bureau of Narcotics and Dangerous Drugs, and not the United States Attorney's office, which had possession of the tape in these cases does not render it any less discoverable. The duty of disclosure affects not only the prosecutor, but the Government as a whole, including its investigative agencies. Rule 16 and the Jencks Act refer, respectively, to

evidence gathered by "the government" and by "the United States," not simply that held by the prosecution. *Brady* did speak of "suppression by the prosecution," but in this context "prosecution" is certainly broad enough to include investigation. In any event, we are confident that the Supreme Court would extend its holding to suppression by investigative agencies. Such suppression must be regulated if the disclosure requirement is to be a strong safeguard; if only the prosecutor were under the command of *Brady*, the right to a fair trial would depend on the uncertain and uncontrolled decisions of Government investigators.

As the Court in *Bryant* noted, the thrust of *Brady* cannot effectively be limited to material within the possession of the prosecutor alone. The *Bryant* decision reflects that *Brady* should be applied *at least* to investigative agency should be the farthest reach of *Brady*. Respondent acknowledges that the investigative agency may be a proper outer limit as to a violation of due process by suppression of evidence *when no* demand for specific material in the possession of a specific governmental office has been made. In *Ross v. Texas*, 474 F. 2d 1150, 1153, (5th Cir. 1973), relied upon in the motion to quash, no such specific request had been made. The court there refused to overturn a conviction because allegedly exculpatory reports had not been made available. The 5th Circuit stated that it was "of the utmost significance that neither the prosecutor nor any of his assistants were in possession of the police report *or were even aware of its existence.*" The court properly noted that it could place upon "the prosecutor's shoulders the added burden of discovering all such evidence even though buried somewhere in the files." The 5th Circuit took a considerably different view of *Brady* however, where a specific request had been made before trial. In *United States v. Deutsch*, 475 F. 2d 55 (5th Cir. 1973), the Court noted:

> Before trial defendants moved for the production of Morrison's personnel file, for "insight into the character of said prospective witness," citing *Brady v. Maryland*, 1963, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed 2d 215. The U.S. Attorney responded, "This office does not have the personnel file of D. F. Morrison." The Court rule, "[T] he prosecution cannot be compelled to disclose something which it does not have. Furthermore, the Post Office Department does not appear to be an arm of the prosecution as contemplated by *Brady*.
>
> We find no reference in *Brady* to an arm of the prosecution. It was a Post Office employee who had been sought to be bribed. The government cannot compartmentalize the Department of Justice and permit it to bring a charge affecting a government employee in the Post Office and use him as its principal witness, but deny having access to the Post Office files. In fact it did not even deny access, but only present possession without even an attempt to remedy the deficiency. *Cf. Barber v. Page*, 1968, 390 U.S. 719, 723-724, 88 S. Ct. 1318, 20 L. Ed 255. W do not suggest by citing *Barber* that the government was obliged to obtain evidence from third parties, but there is no suggestion in *Brady* that different "arms" of the government, particularly when so closely connected as this one for the purpose of the case are severable entities. And, of course, the *Brady* rule requires the government to supply evidence useful to the defendant simply for impeachment purposes. *Giglio v. United States*, 1972, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104.

*Cf. United States v. Leichtfuss*, 331 F. Supp. 723 (N.D. Ill. 1971) (requiring disclosure of various Selective Service Board); *Giles v. Maryland, supra*, where evidence allegedly suppressed included action taken by officials in a neighboring county, but known to investigative officers of the prosecuting county.

Finally, even if one accepts *arguendo* that the *Brady* duty does not extend to all specified exculpatory evidence within the possession of the government as a whole, Respondent suggests that the court cannot separate the President from the Prosecutor in this type of situation. The President is, after all, the Chief Law Enforcement Officer of the United States. Under ordinary circumstances, he bears ultimate responsibility for the decision to prosecute and the manner in which the prosecution will be presented. Surely the President cannot insulate material from ordinary defense dis-

covery by taking possession of the evidence and establishing a barrier between his office and the attorney for the government regardless of by what authority that attorney represents the United States. In sum, leaving aside the question of privilege, the material sought by the Special Prosecutor, will be subject to discovery under Rule 16, the *Jencks Act*, and *Brady*, and the prosecutor could appropriately utilize a Rule 17(c) subpoena for the purpose of fulfilling his eventual duty to disclose.

### III. *The Exercise of Executive Privilege Cannot Prevail Over the Defendant's Right to Discovery*

As noted at the outset, Respondent views the issue of Presidential authority to determine the evidence made available in this case as a subject of dispute between the Special Prosecutor and the President *except insofar as it is suggested that such authority may override the defendant's right to discovery*. While Rule 16 provides for the issuance of protective orders as to discovery, that provision is designed primarily to deal with such matters as attempted intimidation of witnesses. See, *U.S. v. Reid*, 43 F.R.D. 520 N.D. Ill. 1967). Though national security has been recognized as a ground for deferring disclosure, see *United States v. Rosenberg*, 10 F.R.D. 521 (S.D.N.Y. 1950), the government has not been permitted to deny disclosure of relevant material on that ground. Both the Supreme Court and lower courts have repeatedly emphasized that government must either make disclosure or dismiss the charges. Thus, in *Alderman v. United States*, 394 U.S. 165, 181 (1968), the court noted:

> The Government concedes that it must disclose to petitioners any surveillance records which are relevant to the decision of this ultimate issue. And it recognizes that this disclosure must be made even though attended by potential danger to the reputation or safety of third parties or to the national security—unless the United States would prefer dismissal of the case to disclosure of the information. However, the Government contends that it need not be put to this disclose-or-dismiss option in the instant cases because none of the information obtained from its surveillance is "arguably relevant" to petitioners' convictions. See also *United States v. Seale*, 461 F 2d 345, 366 (7th Cir. 1972). *United States v. Coplan*, 185 F. 2d 629, (2nd Cir. 1950).



Similarly in *United States v. Reynolds*, 345 U.S. 1, 12 (1953), the Court recognized the crucial distinction between civil and criminal cases even with respect to the non-disclosure of matters relating to important "state secrets":

> "Respondents have cited us to those cases in the criminal field, where it has been held that the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. Such rationale has no application in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented."

The same approach has been followed with respect to privileges relating to effective law enforcement. Thus, in *Roviaro v. United States*, 353 U.S. 53, 60-61 (1956), the Court noted:

> Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action.

Similarly in *United States v. Andolschek*, 142 F. 2d 503, 506 (2d Cir. 1944), the Court, per L. Hand J., noted with respect to a government claim that disclosure of their reports was barred by regulation:

> It is true that in *Boske v. Comingore*, 177 U.S. 459, 20 S. Ct. 701, 44 L. Ed. 846, the validity of a similar regulation was upheld. However, none of these cases involved the prosecution of a crime consisting of the

> very matters recorded in the suppressed document, or of matters nearly enough akin to make relevant the matters recorded. That appears to us to be a critical distinction. While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully. Nor does it seem to us possible to draw any line between documents whose contents bears directly upon the criminal transactions, and those which may be only indirectly relevant. Not only would such a distinction be extremely difficult to apply in practice, but the same reasons which forbid suppression in one case forbid it in the other, though not, perhaps, quite so imperatively. We hold that the regulation should have been read not to exclude the reports here in question.

Surely, the President's authority to disclose the matters subpoenaed, if he has such authority, rests on no higher plane with respect to the defendant than claims of "national security," "state secret" or even protecting the life of a secret informant. It should be noted that the "privilege" claimed by President is not a personal privilege. It exists in the office, and it stems from the same governmental authority that bears ultimate responsibility for this and all other prosecutions. Consequently, Respondent Ehrlichman submits that the government must produce the subpoenaed tapes and documents or dismiss the prosecution.

## CONCLUSION

For the reasons stated above, Respondent Ehrlichman respectfully submits that the government has a duty to



produce the material subpoenaed under the Federal Rules of Criminal Procedure Jencks Act, and *Brady v. Maryland*. Respondent Ehrlichman submits that that use of a subpoena to obtain these materials is proper so that in any event the materials subpoenaed must be produced or the prosecution dismissed.

RESPECTFULLY SUBMITTED,

FRATES, FLOYD, PEARSON, STEWART
PROENZA & RICHMAN
Twelfth Floor
Concord Building
66 West Flagler Street
Miami, Florida

By:

WILLIAM SNOW FRATES

By:

ANDREW C. HALL

and

SPENCER H. BOYER
HENRY H. JONES
Howard University School of Law
Washington, D.C.

By:

SPENCER H. BOYER

By:

HENRY H. JONES

OF COUNSEL

GERALD ISRAEL
University of Michigan College of Law
Ann Arbor, Michigan

## CERTIFICATE OF SERVICE

*I hereby certify that I served a copy of the foregoing respondent John Ehrlichman's brief on all counsel of record in this cause, June 24, 1974.*